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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 969

EDITH R. REYNOLDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Southern District of New York wrote no opinion. The *per curiam* opinion of the court of appeals (Pet. 16–17) is reported at 338 F. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1964 (III–R. 24a), and a petition for reharing was denied on December 11, 1964 (III–R. 46a–52a). The petition for a writ of certiorari was filed on March 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether in connection with the jury's determination of the basis (fair market value) of stock received in 1947 under the terms of a property settlement the trial court arbitrarily excluded evidence of a 1953 sale of the stock.

2. Whether the trial court arbitrarily excluded evidence of a witness' alleged bias.

STATEMENT

In accordance with a marital settlement incident to a divorce, taxpayer received, on July 1, 1947, a one-third interest in the outstanding common stock of the Southwestern Publishing Company and the Southwestern Company. Approximately six years later, in 1953, taxpayer sold the shares to the issuing corporations for a total consideration of $900,000. (Pet. 16.) For the purpose of computing the gain on the sale, it was necessary to determine the adjusted basis of the stock which, in this instance, was equivalent to its fair market value on the date of acquisition. On her 1953 return, taxpayer claimed that the value was $850,000; the Commissioner, on the other hand, determined that it was $202,894.34. (I–R. 10a.)

At the trial, both parties offered expert testimony on the question of valuation. Taxpayer's expert valued the stock at $981,667. (Tr. 120.) [1] The government's expert testified to a value of $188,516.67. (II–R. 4b.) As part of her case-in-chief, taxpayer read into the record portions of the deposition of her former husband, Donald W. Reynolds. (Tr. 48–88.)

[1] "Tr." references are to the transcript of proceedings.

At that time, taxpayer established the expertness of Mr. Reynolds. (Tr. 57; II–R. 21b.) The government was then permitted to read those parts of the deposition containing its cross-examination of Mr. Reynolds.[2] (Tr. 88.) It was Mr. Reynolds' opinion—as brought out in that cross-questioning—that the fair market value of the shares was $300,000. (Tr. 99.) When taxpayer thereafter attempted to impeach Mr. Reynolds' credibility because of an alleged adverse interest relating to the valuation of the stock, the trial court sustained the government's objection. (Tr. 109–110.) At another point in the proceedings, taxpayer offered the 1953 sales price as a proper basis for determining the fair market value as of 1947. The trial court excluded this evidence. (Tr. 429–430.) The jury returned a special verdict fixing the value of the stock at $300,000 on the date of acquisition. The court of appeals held that the jury's verdict was supported by the evidence and that the rulings of the trial court were within its sound discretion. (Pet. 16–17.)

ARGUMENT

This case involves nothing more than the soundness of the district court's evidentiary rulings. Petitioner's objections were fully considered and properly rejected by the court below. There is no conflict or other circumstance which would warrant further review.

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[2] Although the government reserved the right to introduce the Reynolds deposition when it went forward with its evidence, it never did so.

1. Taxpayer asks this Court to hold that the trial court had no discretion whether to permit in evidence, before the jury, the 1953 sales price of the two blocks of stock for purposes of proving their market value some six years earlier (on the date of acquisition). This contention ignores the well established principle that in jury cases the trial court has wide authority to exclude matters having only slight bearing on the controverted issues. *E.g., United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 230–231; *Great American Insurance Co.* v. *Horab,* 309 F. 2d 262, 265 (C.A. 8); *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.,* 297 F. 2d 906, 912–913 (C.A. 2), certiorari denied, 369 U.S. 865, petition for rehearing denied, 370 U.S. 920; *Yoham* v. *Rosecliff Realty Co.,* 267 F. 2d 9, 10 (C.A. 3); *Frank R. Jelleff, Inc.* v. *Braden,* 233 F. 2d 671, 679–680 (C.A.D.C.). If the probative worth of an offer is outweighed by the likelihood of its confusing or misleading the jury it may be excluded (*United States* v. *Socony-Vacuum Oil Co., supra; Yoham* v. *Rosecliff Realty Co., supra;* Uniform Rules of Evidence, Rule 45) and, on occasion, must be excluded (*Shepard* v. *United States,* 290 U.S. 96, 104).[3] It is for the trial court to strike the balance, subject to review only for abuse. Here, the court of appeals could find no such abuse because the trial court "quite properly may have deemed the 1953 sale too remote in time to furnish evidence of the value of the stock in 1947". (Pet. 16.) There are countless cases holding that sales are not trustworthy

[3] "When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."

proof of value when they occur a substantial period of time from the valuation date. *Fitts' Estate* v. *Commissioner,* 237 F. 2d 729, 731 (C.A. 8) (sales 3 years prior and 5 years subsequent are too remote); *Williams* v. *Commissioner,* 44 F. 2d 467, 469 (C.A. 8) (7 years prior, too remote); *Evans* v. *Commissioner,* 29 B.T.A. 710, 716 (10 years subsequent, too remote); *First National Bank of Birmingham* v. *Commissioner,* 29 B.T.A. 352, 354–355 (one year prior, too remote); *American Steel Wool Mfg. Co.* v. *Commissioners,* 14 B.T.A. 762 (one year prior, too remote); *Estate of Weingarten* v. *Commissioner,* 13 B.T.A. 249, 254 (4 years subsequent, too remote); *Flowers* v. *Commissioner,* decided January 30, 1963 (P–H Memo T.C. par. 63,027) (sales 4 and 5 years prior, too remote); *Otley* v. *Commissioner,* decided August 16, 1954 (P–H Memo T.C. par. 54,232) ("Sales occurring in 1930 and 1931 are slight evidence of fair market value in 1932"); 10 Mertens, Law of Federal Income Taxation (Zimet Rev.), §§ 59.07, 59.16.[4] Moreover,

[4] Taxpayer relies on in *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U.S. 37, for the purpose of showing that sales have been considered "fifteen years before" (Pet 9) and "thirteen years after the critical date" (Pet. 11). Taxpayer, however, misreads that case. The issue in the case was the basis of cemetery lots (which happened to be fair market value) on March 1, 1913, which was necessary to compute the gain on cemetery lots sold in 1926, 1927 and 1928. The average selling price of cemetery lots between 1912 and 1913 was 76.6 cents per square foot. 300 U.S. at 38. This Court held it was proper to fix the fair market value, on March 1, 1913, at 76.6 cents per square foot. *Id.* at 39. Nowhere in the opinion was a doctrine announced which would allow a determination of fair market value on evidence of sales thirteen years from the valuation date.

as the court of appeals pointed out, if evidence of the sale six years subsequent to the acquisition date had been admitted, "the Government would have been permitted to produce detailed evidence on changed conditions" and "it would have been difficult for the judge to charge laymen intelligibly on the limited consideration that should be given to" such evidence. (Pet. 16–17.) In view of the slight probative value of the 1953 sale, and the probability of confusion entailed by its admission, it cannot be said that the trial court abused its discretion in its exclusionary ruling. See *Yoham* v. *Rosecliff Realty Co., supra.* Whether it might have constituted an abuse if the 1953 sale had been excluded and there were no other evidence more proximate to the valuation date is not a question in this case. The jury's special verdict fixing value was supported (Pet. 16) and taxpayer makes no claim to the contrary.

2. Likewise without merit is the assertion that the trial court erred in excluding evidence that taxpayer's former husband, Mr. Reynolds, paid no tax on the appreciated value of the stock when he transferred it to taxpayer in 1947 (pursuant to the marital agreement). (Pet. 5–6, 13–15.) Taxpayer maintains that this would have shown Mr. Reynolds' self-interest in testifying to a low value on the valuation date. However, the trial court was plainly within bounds in halting a burdensome collateral inquiry into Mr. Reynolds' tax liability, a survey which would have been indecisive at best. In 1947, when the marital agreement was made, the law was unclear whether such a transaction constituted a taxable event. Doubts were

not finally put to rest until 1962 when this Court decided *United States* v. *Davis,* 370 U.S. 65. In addition, at the time Mr. Reynolds' deposition was taken, his 1947 tax liability was fixed since limitations had long expired. It, therefore, does not appear that Mr. Reynolds had an interest adverse to his wife. In rejoinder, taxpayer claims that Mr. Reynolds might still be subject to a fraud investigation (not covered by a limitations period). (Pet. 14–15.) However, the record does not contain the slightest intimation of fraud; nor did taxpayer make an offer of proof to that effect.

Since taxpayer states that Mr. Reynolds was an expert witness for the government, it should be noted that Mr. Reynolds' testimony, in deposition form, was read into the record *as part of taxpayer's case.* (Pet. 15; Tr. 48–88.) The use made of the Reynolds deposition by the government was simply to bring out its cross-examination. (Tr. 88.) The trial judge understood Mr. Reynolds to be taxpayer's witness (see I–R. 25a), and taxpayer did not claim otherwise.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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